United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-7479

No 674 September Term 1976 Decided: March 23, 1977
Argued: February 14, 1977 LUMBARD, TIMBERS, C. J.'s, WYATT, D.J.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

A. E. HOTCHNER,

Plaintiff-Appellee,

-against-

JOSE LUIS CASTILLO-PUCHE,

Defendant,

-and-

DOUBLEDAY & COMPANY, INC.,

Defendant-Appellant.

On Appeal From United States District Court
For The Southern District of New York

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

MERVIN ROSENMAN
Attorney for Petitioner/Plaintiff-Appellee
41 East 57th Street
New York, New York 10022
(212) 371-3633

SIMON J. HAUSER
Of Counsel

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Docket No. 76-7479

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(LUMBARD, TIMBERS, C.J.,
WYATT, D.J.)

PETITION FOR REHEARING AND
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TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

A.E. Hotchner, plaintiff-appellee, respectfully petitions this Court for a rehearing of its decision of March 23, 1977, in the above-entitled case, and suggests that same is appropriate for consideration by all of the judges of this Court.

The Panel hearing the appeal from the judgment of $125,002., entered below on a jury verdict after a one-week trial, reversed with instructions to dismiss plaintiff's amended complaint solely because "there was no evidence from which the jury might reasonably have found that the defendant published the alleged libels with knowledge of falsity or reckless disregard for truth" (Slipsheet Opinion, p. 2529). There was no criticism whatsoever of the actions of the court below (Brieant, D.J.) in connection with the conduct of the trial, the admission or barring of evidentiary matter or his rulings on the several pre-trial motions, and no finding of prejudicial error.

It is respectfully submitted that, in reversing the judgment below, the

Panel overlooked or misapprehended certain principles of law as well as portions of the evidence, mistakenly relied upon testimony as to matter not known to defendant-appellant Doubleday at the time of publication of the defamatory matter, substituted its views of the facts for those of the jury and trial court, and introduced novel concepts of interpretation of "reckless disregard" conflicting with decisions of other panels of this Court and of other jurisdictions.

I. The Panel misapprehended and misapplied the "re-examination duty" laid down in Buckley v. Littell.

In its approach to this appeal, the Panel relied on Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. den. 45 U.S.L.W. 3489 (1/17/77), in support of its statement that:

> "To ensure that proper weight has been given to the protection of first amendment rights, it is important that the court make 'an independent examination of the whole record' in scrutinizing a jury finding of scienter in a libel case". (Slipsheet, p. 2526).

While this Court stated in Buckley v. Littell that "the First Amendment requires careful appellate review of the facts found at trial which have constitutional significance" (888), we submit that the "duty to 're-examine the evidentiary basis' of the lower court decision . . . in the light of the Constitution" does not nullify the general principles as many times previously stated by it, viz., that the evidence must be viewed in the light most favorable to the appellee and that insofar as factual issues are concerned the verdict for plaintiff is entitled to the greatest weight.*

*For example, in Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736, 743-744 (2d Cir. 1966), cert. dism. 385 U.S. 801 (1966), Judge Kaufman said in the unanimous decision upholding the verdict in that post-New York Times libel case:

> "Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. [citations]. When reviewing the refusal of a judge to grant a directed verdict we must view the evidence and all inferences which reasonably flow from it most favorably to the party against whom the motion was directed. [citations].
>
> "Appellant also complains that its motion for a new trial on the ground that the verdict was against the weight of evidence, should have been granted. The granting or refusing of a new trial rests within the discretion of the trial court, and its decision will be reversed only for clear abuse of discretion. [citation]."

In short, the additional burden of proof imposed upon plaintiff by New York Times v. Sullivan, 376 U.S. 254 (1964), and related cases have not changed the way the findings below are to be considered. Reviewing those cases, the court aptly said in Guam Federation of Teachers Local 1581, AFT. v. Ysrael, 492 F.2d 438 (9th Cir. 1974), cert. den. 419 U.S. 872 (1974), at 441:

> "We think that in a libel case, as in other cases, the party against whom . . . a motion for a direct verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of the facts. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeals, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.
>
> "The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined is the same as in all other cases in which it is claimed that a case should not go to the jury". (emphasis by the court).

The determination as to whether Doubleday published the Book with "actual malice" required by New York Times v. Sullivan was for the jury as the finder of fact. St. Amant v. Thompson, 390 U.S. 727, 732 (1968). So, in Buckley v. Littell, supra, this Court stated at p. 896:

> "[the findings were] that Littell's statement that Buckley engaged in libelous journalism was made with knowledge of its falsity or in reckless disregard of its truth or falsity, and this is a finding based in part upon credibility and demeanor which we cannot go behind." (emphasis supplied).

It seems clear from the foregoing that the Buckley v. Littell "duty to re-examine" is not irreconcilable with the Guam Federation decision. We submit there was more than enough evidence to support the jury verdict for appellee Hotchner.

Certainly an appellate court, even in First Amendment cases, is not authorized to substitute its own view of the evidence in place of the jury's findings of "reckless disregard" as properly defined by the trial court in its

charge, nor should the appellate court, in overturning the jury's findings, take into consideration testimony as to matter not known to the publisher at the time of publishing the defamatory matter.

II. The verdict was more than adequately supported by clear and convincing proof that Doubleday published with reckless disregard of the truth. The Panel not only overlooked or misapprehended that evidence but also, applying novel principles of law, in effect tried the case de novo, relying on testimony of defendant's witnesses that obviously had been rejected by the jury and also on matter not known to Doubleday at the time of publication, and substituted its own view of the facts for that of the jury and trial court.

The nub of the Panel's opinion reversing the judgment in favor of plaintiff is simply that although:

> "In this case, the jury could reasonably have found that, contrary to the impression of intimacy conveyed by his book, Castillo-Puche's actual contact with, and first-hand knowledge about Hotchner was virtually nil (Slipsheet, p. 2527), . . . there was no evidence on which the jury might reasonably have found that the defendant Doubleday published the alleged libels with knowledge or reckless disregard for the truth" (ibid, p. 2529).

With that conclusion, we respectfully but emphatically disagree:

While "'reckless disregard', it is true, cannot be fully encompassed in one infallible definition" (St. Amant v. Thompson, supra, 390 U.S. at 730), if defendant entertained serious doubts as to the truth of his publication, "publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice". Ibid., 731.

Recklessness on the part of Doubleday may be found if there were "obvious reasons" to doubt the veracity of Puche or the accuracy of his reports. Ibid., 732; Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969); cert. den. 396 U.S. 1049 (1970), rehear. den. 397 U.S. 978 (1970); Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976).

If, for example, knowing that there was a high probability that Puche's statements about Hotchner might be false, Doubleday took a calculated risk and published the matter anyway, that would be an example of "reckless disregard". Varnish v. Best Medium Publishing Co., 405 F.2d 608, 612 (2d Cir.

1968), cert. den. 394 U.S. 987 (1969), rehear. den. 394 U.S. 930 (1969); Carson v. Allied News Co., supra, 529 F.2d at 213.

As Judge Brieant said regarding that proof of liability in his Memorandum denying Doubleday's motion for judgment n.o.v. or a new trial:

> "[W]e think the proof more than adequate to support the detailed and carefully considered special findings of our attentive and diligent jury. Our jury could and did find, as to those of Hotchner's claims which it found actionable, that clear and convincing evidence showed Doubleday published with reckless disregard for their truth or falsity. Indeed, for the most part this clear and convincing evidence is documentary and comes from Doubleday's files, or was in possession of persons whose knowledge the jury could reasonably impute to Doubleday." (177-8a).

That evidence included the following:

A year before publication, Doubleday's employees had serious doubts about the references to Hotchner in the Book. On July 13, 1973, editor Medina sent a memorandum (Exh 7, 212a) to the Manager of Doubleday's Contracts Department, enclosing eight pages (Exhs 5A-G, 203-210a) of Lane's translation relating to Hotchner, asking him for his opinion as to whether what she termed the "bitchy" and "side-swiping" matter should be left in. In addition to many of the words the jury found libelous, those eight pages contained phrases from the Spanish Work which showed Puche's bitter hatred of Hotchner. Exh 5D (206a) purports Hemingway saying about Hotchner "he's dirty and a terrible ass-licker. ... I wouldn't sleep in the same room with him",* and Exh 5E (208a) purports Hemingway saying of Hotchner "he's never done me dirt, but he's the sort of person you have to keep your eye on every minute".

The reply memorandum (Exh 9), of young William Austin, the Assistant Contracts Manager of Doubleday, who was not a lawyer, urged that these references to Hotchner be "toned down or eliminated" by Medina, and concluded:

*There are two obvious inferences from this quotation, both libelous. Either Hotchner would steal his valuables or would make homosexual advances. The latter inference is intended by Puche for on p. 82 of the Book, he quotes Hemingway: "I don't trust anyone . . . I did once and the guy tried to hop in bed with me", as part of a conversation explicitly dealing with Hotchner.

"When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems to be an author who has worked in movies and TV, this could be a serious matter.

To make matters worse I doubt whether any of these statements can be substantiated in any way.

From reading the pages you sent, this treatment borders on 'malice', which together with 'reckless disregard for the truth', is a prime element in any libel action . . ." (emphasis added) (214a).*

This alone was sufficient to impose a duty of inquiry upon Doubleday, if not per se to substantiate the finding of reckless disregard.

Cf. this Court's comment in Buckley v. Littell, supra, 539 F.2d at 896:

"Furthermore, Littell's publisher was very concerned about the paragraph in which the Pegler reference occurs, although not specifically about the sentence here found to be libelous; this concern should have been a red flag to Littell."

So, in Carson v. Allied News Co., supra, 529 F.2d at 211, the Court noted:

"They were also aware as publishers that the substance of the defamatory statements they were publishing made 'substantial danger to reputation apparent' [citations]."

Fully aware of Puche's hatred toward Hotchner, his reckless disregard for the truth, and the problems involved in this publication, Medina wrote to Puche on August 6, 1973 (Exh 1., regarding:

". . . the possibility of libel to Hotchner in the book. You are certainly entitled to your opinion of Hotchner, and you may very well be right--it seems to our lawyers** that it would be a good idea if we would tone down some of your remarks about him, on the off chance that he could possibly bring suit against you. The fact that he is an American author with quite a reputation***, and also I seem to recall a professor, it's possible that he would think some of your remarks border on 'malice' (in the legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds 'damaging to his reputation and character'. ..." (emphasis added). (217a).

*More than one year prior to the Austin memorandum, Medina had been put on notice by a letter from Lane (Exh 17), as to the general unreliability of Puche's Book:

"Moreover I discover hat a large number of Castillo-Puche's comments about the episodes ingway's novels contain gross errors of fact ... Groan! ...Groan!"(227a) (emphasis added).

**The statement attributed to "our lawyers" was a Medina fabrication for no lawyer saw the Book prior to publication (253t). The fact that, despite the serious doubts of Medina and Austin, legal counsel was never consulted is also evidence of recklessness under the circumstances.

***Recognition of Hotchner's prominence and nevertheless not checking into the facts is further evidence of recklessness.

In addition to the foregoing documentary evidence and admissions, plaintiff introduced further evidence from which the jury could infer Doubleday's knowledge of Puche's unreasoning hatred of Hotchner and the suspicion of falsity which must necessarily be aroused.

The testimony of Professor Purczinski (259-268a) and his translations in a comparative table with the Lane translation (where available) and the Book (Exh 30, 230a et seq.) shows the unbridled attacks on Hotchner personally in the original Spanish book. Exh 30 reveals Puche saying of Hotchner: "his role of shit-licker of the old colossus was so ostentatious that it almost made you want to vomit" (230a), "that his [Hotchner's] gaze which was a cross between a voluptuous cornered animal, a lynx with a 'quinqui'"(Spanish slang for hold-up man)(233a), "what he [Hotchner] looked most like was the leader of one of the New York or Chicago gangs" (233a), and "Hotchner, with mocking face of the congenial gutter-rat" (234a).*

Obviously, in translating the Puche book from Spanish to English, Doubleday's agent Helen Lane acquired knowledge of that irrational vicious hatred, and, as said in Judge Brieant's Memorandum, that "knowledge the jury could reasonably impute to Doubleday". (178a).

The bald and inescapable fact is that Doubleday published with "serious doubts" after acquiring knowledge of its author's bitter hatred of Hotchner, i.e., "with obvious reasons to doubt the veracity of the informant or the accuracy of his reports". St. Amant v. Thompson, supra, 390 U.S. at 732; Carson v. Allied News Co., supra, 529 F.2d at 213-4, and without making the slightest effort to verify the facts despite its knowledge of that virulent animosity.**

*Cf. those scurrilous descriptions with Hemingway's reference to Hotchner's "rugged honest face" in the Life Articles (Exh 29-C).

**The rule that a principal is bound by knowledge of his agent as to all matters within the scope of agency, applies as well to material facts which the agent would have discovered had [s]he inquired, i.e., what s[he] should have known. See Bennett v. Buchan, 76 N.Y. 386, 390-391 (1879); Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 71-72, 126 N.E. 260, 265 (1920); Farr v. Newman, 18 A D 2d 54, 58-59, 238 N.Y.S.2d 204, 208-209 (4th Dept. 1963); affd. 14 N Y 2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964).

While it may be true that, as the Panel said at p. 2526, "mere negligence is not actionable", it is certainly true that evidence of negligence may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. Goldwater v. Ginzburg, supra, 414 F.2d at 342. This Court continued at p. 343:

> "As already stated, supra, Times does not hold that evidence of recklessness is inadmissible ... Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court". (citing St. Amant v. Thompson, supra, at 732-733).

Furthermore, in reviewing the evidence adduced by plaintiff, while the Panel mentions the elimination or toning down by Doubleday's editor of "very uncomplimentary references to Hotchner" in the translation from the Spanish edition (Slipsheet, p. 2523), it makes no mention whatsoever of Medina's letter to Puche dated August 6, 1973, in which she recognizes his intention "to get at Hotchner, one way or the other, very strongly", and sought to console him by assurances that even after the bowdlerization, "I [i.e., Doubleday's editor] certainly won't make Hotchner look marvelous". Similarly, the Panel ignored Medina's letter to Puche dated October 10, 1973, along similar lines.*

Certainly Doubleday had reason to "seriously doubt" the scandalous accusations especially where the libel warning from its employee Austin recognized Hotchner as a man of stature and Medina knew him as an intimate and biographer of Hemingway whom, as she said in her letter to him before publication, had written "such a wonderful book about Hemingway" (Exh 22).

Under the circumstances Puche's attacks were so "inherently improbable" that to rely solely on his words did not release Doubleday from responsibility. Goldwater v. Ginzburg, supra, 414 F.2d at 337; Carson v. Allied News Co.,

*Both of those exhibits were quoted in our brief at p. 20.

supra, 529 F.2d at 213.

The Panel's weighing against the testimony of the various witnesses produced by plaintiff [incidentally, it omitted any reference to the powerful testimony of Mary Schoonmaker (see appellee's Brief, pp. 10-11)] the testimony of the witnesses produced by Doubleday was improper in several respects:

(a) The Panel was only to determine whether there was sufficient evidence adduced by plaintiff-appellee to justify the jury's finding of knowing falsity or reckless disregard, and not to re-evalue that evidence from its own remote viewpoint. Indeed, the jury had the right to disbelieve the testimony of every one of Doubleday's employees and other ex post facto witnesses especially Mary Hemingway, Valerie Hemingway and Alfred Rice, especially in view of their admissions, equivocations and fencing with opposing counsel on the devastating cross-examinations.

(b) The testimony of Sister de Mola, who wrote her Ph.D. thesis on the fictional work of Castillo-Puche (593t) that he was an "important novelist" and Carrascal's testimony that Castillo-Puche was "one of the most important reporters in Spain" (Slipsheet, p. 2523) is meaningless inasmuch as such testimony was adduced for the first time at the trial and was not known to Doubleday at the time of publication when the cause of action arose.* Goldwater v. Ginzburg, supra, 414 F.2d at 344.

(c) Referring to the libelous comments about Hotchner's untrustworthiness, the Panel says at p. 2528:

> "As originally translated, Hemingway's words were: '[Hotchner] is dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him.' ... as all the witnesses at trial agreed, the language used and sentiments

*As pointed out in Appellee's brief (p. 12), she testified she first spoke to Doubleday long after publication of the offensive Book, and Carrascal said his first communication with Doubleday was four weeks before the trial.

expressed were not uncharacteristic of Hemingway".

Such statement is indeed contrary to the Record: Not only to the testimony of Hotchner (289-290a) and Annie Davis (323a, 273t), Mary Schoonmaker (335-337a, 340a) but even that of Mary Hemingway, Doubleday's witness, who admitted she had never heard Hemingway make a derogatory remark to Puche or anybody else about Hotchner (509,534-5t), and stated that she had never heard her husband to be coarse or crude (575t). Mrs. Hemingway on redirect testified that prior to Hotchner publishing Papa Hemingway, she felt he was a very good and close friend of Hemingway (469t) and Valerie Hemingway, also a Doubleday witness, admitted on cross-examination that Hemingway regarded Hotchner as a close friend (425t).

By its decision herein, the Panel has literally authorized and approved a novel rule that to our knowledge has no reported precedent--viz., that a publisher, knowing of an author's virulent hatred of the plaintiff and warned by its own employee of the possibility of a libel suit and that it was doubtful that the truth of the scurrilous statements could be substantiated "in any way", may nevertheless publish with impunity that defamatory matter without making the slightest effort to verify or even consulting its own lawyers. If defendant-appellant's conduct was not "reckless disregard" then that term is for all practical purposes rendered meaningless by this decision.*

*The Panel conceded that Doubleday was "on notice of Castillo-Puche's animosity toward Hotchner (Slipsheet, p. 2527), but apparently overlooked the law that a mere assertion by a defendant that it believed the matter published by it to be true does not insure against liability, nor does a mere denial that it did not bear plaintiff personal ill-will or an allegation that the publication was made in good faith (incredible in the light of Doubleday's knowledge of its author's bitter hatred of Hotchner). St. Amant v. Thompson, supra, 390 U.S. at 732; Carson v. Allied News Co., supra, 529 F.2d at 213-4; Guam Federation of Teachers v. Ysreal, supra, at 439. Even the Court in Kapiloff v. Dunn, 343 A.2d, cited by the Panel, acknowledged omission to investigate as a factor, saying at 269:

> "Although failure to check source material with experts may be one instance in a pattern of conduct showing complete disregard for the truth [citing Butts and Goldwater], we find no such pattern in the instant case".

See also the quotations from Buckley v. Littell and Carson v. Allied News, at p. 6 supra.

The Panel says that "Doubleday's failure to conduct an elaborate independent investigation did not constitute reckless disregard of the truth"; and that "Doubleday could have inferred that Hemingway had affection and respect for Hotchner, but no means were readily available for verifying or discrediting Castillo-Puche's account" (Slipsheet, 2528; emphasis supplied). Respectfully, those statements are in complete disregard of the facts:

Doubleday already had "serious doubts" solidified by Austin's report (p. 5-6, supra), yet made absolutely no investigation whatever. Editor Medina did all the abortive"toning-down" without help except from young non-lawyer Austin (252t); no one at Doubleday other than a copy editor read the entire translation (252t); Medina never questioned Puche's vicious remarks about Hotchner in the Spanish Work (253t), nor mentioned Hotchner to Lane (197a); no one at Doubleday read Papa Hemingway, much less compared it to either the translation or the galleys of the Book (257t) [if they had they would have found Hotchner lists those present in Pamplona and elsewhere in Spain the summer of 1959 (Exh 28, pp. 234-5), and there is no mention of Castillo-Puche]; there was no consideration given by Medina or Doubleday of sending translations or galley proofs to any of the people mentioned by Puche as being friends and associates of Hemingway (255t); and no consideration given to showing the translation or galleys to Hotchner (256t)--or even asking him if he knew Puche--even though Medina rather "two-facedly" wrote to Hotchner on March 13, 1973 (Exh 22), requesting him since he "wrote such a wonderful book about Hemingway", to help in getting for Doubleday copies of the three Hemingway articles entitled "The Dangerous Summer" in Life Magazine (the "Life Articles")(229a), which articles also list the people at Pamplona--again no mention of Puche.*

*The Life Articles certainly put Mrs. Medina on notice of the high regard in which Hemingway held Hotchner (see Exh 29B and C). Puche quotes the Life Articles throughout the Book, and presumably obtained his information about the events in Pamplona and elsewhere in Spain that summer from them and from the Spanish edition of Hotchner's Papa Hemingway. He referred to that volume in his letter to Doubleday (Exh 12, 219a), in which he said: "I don't want him [Hotchner] to appear as a man who was in Ernest's most sincere trust and as a possessor of all his secrets like he made it look in his book".

The only portion of the Book in which Puche claims to have been present with Hemingway and his entourage deals with the Festival in Pamplona in 1959. Published in 1974, it certainly was not "hot news". More than four years elapsed from the time Doubleday acquired the English rights to Puche's book to the time it published the Book. Obviously the more time to investigate, the more the possibility of liability where defendant failed to properly do so. Thus this Court said in Goldwater v. Ginzburg, supra, 414 F.2d at 339:

> "The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of shipshod and sketchy investigation techniques; ..."

Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), at p. 157:

> "The evidence showed that the Butts story was in no sense 'hot news' and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored."

See also, Carson v. Allied News Co., supra, 529 F.2d at 211.*

The Panel's decision also further diminishes the "reckless disregard" rinciple by introducing another novel concept, i.e., "an assertion that cannot be proved false cannot be proved libelous" (ibid., p. 2526). "Incapability of independent verification" (ibid., 2528) not only opens the door wide but is indeed an imprimatur for unbounded libel by allowing a publisher to issue defamatory matter as the word of a dead man who is not available to denounce the lie.** In the case at bar, while of course the

*The Panel said "Doubleday's editor did confirm with Castillo-Puche that he stood by his account of the incident" (ibid., 2528), but her letter of August 6, 1973 (Exh 11), is clear that she did not write for confirmation but merely for permission to delete the most scandalous matter, consoling him that even with the deletions and toning down "I certainly won't make Hotchner look marvelous" (emphasis supplied). Such language indicates not merely "reckless disregard" but actual participation and cooperation. Whether Puche's reply (q.v.) was more of a consent to lessening the possibility of a libel suit than a confirmation is, again, a matter for the jury to decide.

**If the law is to be changed "that action should be taken by the full court, not by way of a panel opinion and its implications". U.S. v. Masters, 539 F.2d 721, 732 (D.C. Cir. 1976).

deceased Hemingway could not testify, there was ample "convincing indicia of unreliability" available to Doubleday by simple references to his own articles and inquiry to the readily available other Hemingway intimates such as Bill and Annie Davis referred to in the Puche Book and elsewhere, as well as comparison with Hotchner's Papa Hemingway.

Exception must also be taken to the Panel's statement that "a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be". (ibid., p. 2526-7). The governing New York law set forth in such leading cases as Triggs v. Sun Printing & Publishing Association, 179 N.Y. 144, 154-55, 71 N.E. 739 (1904), is that the privilege of fair comment (criticism) is based on good faith and does not carry with it an unlimited license of vindictive unreasonable personal attack.* The First Amendment decisions have not rendered it inapplicable in this case:

> "The so-called privilege of fair comment is conditional and may be vitiated by proof of actual malice, i.e., knowing falsity or reckless disregard". Curtis Publishing Co. v. Butts, supra, 388 U.S. at fn. 152.

In Goldwater v. Ginzburg, supra, 414 F.2d at 341-2, this Court commented:

> "The Times decision changed state libel law only to the extent of requiring public officials to prove actual malice with convincing clarity ... The evidence submitted in Sullivan only showed the defendant newspaper had leveled an impersonal attack on certain government operations ... the derogatory articles, statements and cartoons Fact published were leveled at Senator Goldwater personally."

Buckley and Gertz speak out for free expression of honest ideas of political-sociological interest--they do not authorize vicious personal character attacks under the guise of opinion. Thus in Buckley, this Court while it reversed a portion of a judgment based on an attack on the political views of the plaintiff, affirmed with respect to the statements regarding

*As in the case at bar, plaintiff's appearance and conduct were attacked. The case was cited and briefly quoted by this Court in Reynolds v. Pegler, 223 F.2d 429, 431-2 (2d Cir. 1955), cert. den. 350 U.S. 846 (1955).

his ability as a journalist, and declined to go behind the findings below of reckless disregard (see quotation supra, p. 3). The Court also said:

> "In short, whatever might be said of a person's political views, any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is 'crucial' to such a person's career that he or she not be so treated". (pp. 896-7).*

The Supreme Court said in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974):

> "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open debate on public issues'". (emphasis supplied).

In short, freedom of speech is to encourage circulation of ideas of social value—it is not intended to protect character assassination.

In the case at bar, all six passages found by the jury to be libelous and to have been published by Doubleday in reckless disregard of the truth reflected on personal qualities of Hotchner. They certainly are not an exposition on topics of "enormous public interest" such as "democracy against totalitarianism and about the continuation of the freedom of religious worship" referred to in Buckley v. Littell, supra, 539 F.2d at 889. They patently are a nasty personal attack on the man who is widely known as Hemingway's trusted confidante and advisor and one of his most intimate friends.

The matter of fair comment and bona fide opinion versus actionable personal attacks is a matter for the jury. See e.g., Sun Publishing, supra; Cheatham v. Wehle, 5 N.Y.2d 598, 615, 159 N E 2d 166 (1959). So also in Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 71-72, 126 N.E. 260, 265 (1920), with facts strikingly similar to here, it was held for the jury to find recklessness in the editor's indifference as to whether the "author's diatribes

*There can be no question that the allegations of hypocrisy and untrustworthiness under the circumstances of the case at bar are libelous per se under New York law, and even Doubleday did not argue otherwise in its brief.

were intended as mere generalizations or as offensive personalities, and, if the latter, whether they were fair criticism or malicious falsehood." (see quotation App.Bf. pp. 22-23). Judge Wyatt himself said in Goldwater v. Ginzburg, 261 F.Supp. 784 at 786:

> "The distinction between fact and opinion has proved to be a most unsatisfactory and unreliable one difficult to draw in practice ... Whether a statement is one of fact or of opinion (comment) is probably one for the jury to decide [citing authorities]".

Judge Haight recently said in Herbert v. Lando (S.D.N.Y. 1/4/77):

> "The concept of 'reckless disregard for truth' inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish". (p. 9 of typed opinion).

Surely a finding by a jury of "reckless disregard" upheld by the trial court is not to be overturned by an appellate court where, as here, there was clear and convincing evidence substantiating it.

As stated in Sprouse v. Clay Communications Inc., 211 S.E. 2d 674, 689-90 (1975), cert. den. 423 U.S. 882 (1975), rehear. den. ibid. 991 (1975):

> "Each case must be considered by an appellate court on its facts with a strong sympathy toward protection of the robust political discussion contemplated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached and a jury must be permitted to find malice ..."

WHEREFORE, upon the foregoing grounds and for the reasons set forth in appellee's brief previously submitted to this Court, it is respectfully submitted that this petition for rehearing and for rehearing en banc be granted and that, upon further consideration, this Court's decision of March 23, 1977, should be withdrawn, and the judgment of the District Court should be affirmed in all respects.

Dated: April 4, 1977

Mervin Rosenman

MERVIN ROSENMAN, attorney for
petitioner plaintiff-appellee

Simon J. Hauser

SIMON J. HAUSER, of counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

JAMES RATLIFF, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 2 CHARLTON ST. NEW YORK, N.Y.

That on the 5 day of APRIL, 1977, deponent personally served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing ____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

SATTERLEE & STEPHENS
ATTORNEYS FOR DEFENDANT-APPELLANT
277 PARK AVE
NEW YORK N.Y. 10017

HENRY R. KAUFMAN, ESQ.
ATTORNEY FOR ASSOCIATION OF AMERICAN PUBLISHERS INC.
AMICUS CURIAE
ONE PARK AVE
NEW YORK, N.Y. 10016

James Ratliff

Sworn to before me this
5th day of April, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979